BURKE, WARREN, MACKAY & SERRITELLA, P.C.

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BWM&S

ADAM JUNG APPOINTED TO UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN'S CHICAGO ATHLETICS ADVISORY BOARD

Burke, Warren, MacKay & Serritella, P.C. partner Adam Jung has been appointed to the University of Illinois at Urbana-Champaign's Chicago Athletics Advisory Board. The board, comprised of University of Illinois alumni and supporters with deep connections to Chicago, provides assistance and recommendations to the University's Division of Intercollegiate Athletics as it continues to pursue increased exposure and support for Fighting Illini athletics throughout Chicagoland.

Adam Jung

"As a two-time graduate of the University of Illinois, I have

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(From left) The Firm's Danielle Gould, Joanne Casciaro, Aaron Stanton, Shannon Lund and Rachel Yarch wear (former Cubs Announcer) "Harry Caray glasses" at the @properties Angels in the Outfield fundraiser held on October 4th at the Chicago Sports Museum. The event was sponsored by Imerman Angels, One-on-One Cancer Support and Fundraising Network, and @givesback, charitable arm of firm client @properties, to support the efforts of both organizations to spread the message that no one should have to face cancer alone.

EMPLOYEE BENEFITS

RACHEL YARCH DISCUSSES SUPREME COURT ERISA DECISION ON NATIONAL CATHOLIC RADIO NETWORK

Major Victory for Religious-Based Health Care Systems

Earlier this year, the United States Supreme Court issued a unanimous[1] decision in *Advocate Health Care v. Stapleton*, holding that faith-based hospital pension plans are covered by the "church plan" exemption under the Employment Retirement Income Security Act ("ERISA").

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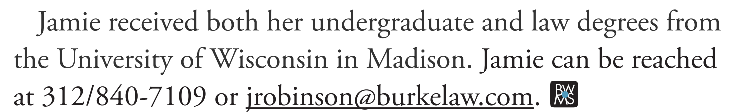
Experienced Partner Joins Firm's Litigation Team

The attorneys at Burke Warren MacKay & Serritella welcome their new litigation partner Jamie Robinson. She will be joining the Firm's litigation, appellate, health care and religious practices.

Jamie Robinson

Jamie's clients range from faith-based hospitals and retirement communities to developers and municipalities. Her areas of practice include payor-payee disputes, medical privilege hearings, employment, trademarks, trade secrets and general commercial business disputes. Jamie has also handled a wide variety of land-use cases including disputes regarding the constitutionality of zoning ordinances, adult uses, eminent domain, evictions and other land use disputes under the Administrative Review Law. Jamie handles matters in both state and federal courts, has handled several appeals and regularly represents clients in mediations and arbitrations.

Searching for a new home for her practice, the former Nixon Peabody partner found just what she was looking for at Burke, Warren. "I was thrilled to find a mid-size, full service firm focused on high level client service in a smart, collegial environment that could meet my clients' changing needs," said Jamie.



Jamie received both her undergraduate and law degrees from the University of Wisconsin in Madison. Jamie can be reached at 312/840-7109 or jrobinson@burkelaw.com.

SUPREME COURT ERISA DECISION

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Rachel Yarch

The Firm's Rachel Yarch was invited by Relevant Radio to provide commentary on the decision on the Relevant Radio network that serves the Catholic Church with 46 stations reaching 25 states. The national headquarters of this listener-supported lay apostolate is located in Green Bay, Wisconsin.

According to Yarch, ERISA was established in 1974 by an act of congress to provide uniformity and protections among pensions offered by private employers. However, the law included consequences not intended for the plans offered by churches and other religious entities.

"In the 1980s, Congress expanded the church plan exemption to include the pension plans of church-affiliated organizations," said Yarch. "In recent years, current and former plan participants brought class action law suits arguing that the exemption should only apply to pension plans that were actually established by a church. Indeed, three federal appeals courts, including the Seventh Circuit, agreed and ruled against church-affiliated pension plans such as Dignity Health, Advocate Health System and St. Peter's Healthcare System as not being covered by the church plan exemption."

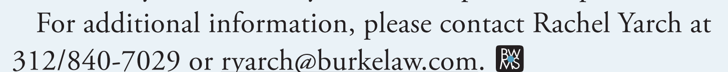
Justice Elena Kagan wrote the unanimous opinion holding

According to Yarch, ERISA was established in 1974 by an act of congress to provide uniformity and protections among pensions offered by private employers. However, the law included consequences not intended for the plans offered by churches and other religious entities.

that: "a plan maintained by a principal-purpose organization qualifies as a 'church plan' regardless of who established it." This is a major victory for religious-based health care systems.

"We anticipate that the decision will have a broad impact across the spectrum of pension plans maintained by faith-based hospitals and affiliated organizations," Yarch continued.

Therefore, the pension plans of hospital systems, nursing homes, assisted living facilities, and schools which are affiliated with a church, but not necessarily established by a church, may be covered by the church plan exemption.



For additional information, please contact Rachel Yarch at 312/840-7029 or ryarch@burkelaw.com.

[1] *Eight of the justices participated in the decision. Neil Gorsuch did not participate because he was not on the bench when the Court heard oral argument last year.*

Employers Must Be Mindful Before Punishing Employees for Their Social Media Usage

Social media is an integral part of your business whether you intend it to be or not. This article addresses pitfalls for employers to avoid in dealing with employees' use of social media, and provides tips for crafting social media policies to address certain issues before they become detrimental to your business.

Most businesses acknowledge that their employees are potentially their most significant asset, yet also their greatest potential liability. Your employees are a firsthand reference for people to learn about your company, and its culture. Their social media postings reflect on your organization, and they have an equal if not greater impact on the public perception of your business. Positive comments about your company are free "advertising," but the tide can turn quickly when posts turn sour. A disgruntled employee that voices his or her dissatisfaction on the internet may negatively impact your company's overall image, diminish its reputation, and diminish profits. Pew Research Center reports that of U.S. adults, nearly 70% use Facebook, nearly 25% use LinkedIn, and 20% use Twitter.[1] That means that the overwhelming majority of your workforce is sharing ideas, opinions, and information over social media. Undoubtedly, those employees are, or have been, sharing information that may be embarrassing or unflattering to your business.

Nick Gowen

The National Labor Relations Act ("NLRA"), has established rules for relationships between unions and management, as well as protecting the rights of employees to communicate with one another about the terms and conditions of their employment. This right applies whether or not the workplace is unionized.

Despite a business' legitimate concerns about protecting its brand by limiting its employees social media presence, employers must resist any knee-jerk reaction to punish an employee for public comments made on social media.

Punishing an Employee for Social Media Activity May Violate Federal Law

It seems every week there is a news story regarding employers of all sizes terminating employees who make social media postings critical of their employer, or that otherwise harm the employer's reputation. Although employers generally have the freedom to terminate at-will employees (even for off-work activity), they must be mindful that taking adverse employment actions against employees for their social media activity is not appropriate in all circumstances.

The National Labor Relations Act ("NLRA"), has established rules for relationships between unions and management, as well as protecting the rights of employees to communicate with one another about the terms and conditions of their employment. This right applies whether or not the workplace is unionized. While it may seem a stretch that employees have a legal right to bash their employers on social media, the NLRA allows employees to engage in "protected concerted activities," such as group action to improve wages, benefits, and working conditions, and to engage in union activities and support a union. Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

The National Labor Relations Board ("NLRB") has actively pursued employers that fire or discipline employees for posting critical comments about the company on social media or blogs. If a group of employees post comments criticizing management or their working conditions, for example, that might be found to be protected concerted activity, for which the employees may not be disciplined or fired. The NLRB has found that disciplining employees for online posts criticizing their working terms and conditions — including their pay, their supervisors, and even their cubicles — could violate the NLRA. The NLRB has construed Section 7 of

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INTELLECTUAL PROPERTY

Changes in Trade Secrets Law Mandate Updates to Employment Agreements

Changes in the law may make it necessary for many employers to review their employment agreements and confidentiality provisions.

Effective May 11, 2016, The Defend Trade Secrets Act of 2016 ("DTSA") created a federal civil cause of action for trade secret misappropriation. DTSA authorizes the owner of a trade secret to bring a lawsuit in federal court for the misappropriation of its trade secret that is related to a product or service used in, or intended for use in, interstate or foreign commerce. DTSA does not preempt existing state trade secret laws from which it was largely modeled, but rather it creates a broader definition of a trade secret that will ultimately lead to new federal case law interpreting its provisions.

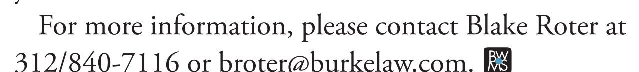
Trade secrets can include customer lists, computer codes, manufacturing processes, scientific formulas, and other financial, business, scientific, technical, economic or engineering information, under two conditions: (1) the owner has taken *reasonable measures* to keep such information secret; and (2) the information derives *independent economic value from not being generally known* to, and not being readily ascertainable through proper means by another person who can obtain economic value from the disclosure or use of the information.

Thus, long before an employee resigns and steals potential trade secrets, it is crucial to take reasonable preventative measures to prevent the theft in the first place (and to qualify confidential information under the definition of trade secrets). Those can include: (1) security measures — limiting access to confidential information, password protection, locked file cabinets, etc.; and (2) employment agreements — provisions relating to confidentiality, non-competition, non-solicitation, inventions and intellectual property, etc.

Blake Roter

DTSA requires that all agreements with employees, contractors and consultants entered into or updated on or after May 11, 2016, that govern the use of trade secrets or other confidential information, contain a whistleblower immunity notice pursuant to 18 U.S.C. § 1833(b)(3). Lacking such a notice, a lawsuit under DTSA will not be able to recover exemplary damages or attorneys' fees resulting from trade secret misappropriation (although injunctive relief and actual damages are still available).

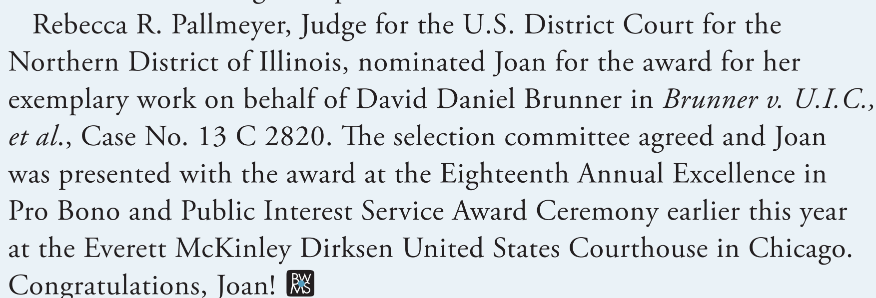
Even though some agreements may have been entered into before May 11, 2016 (and the notice requirement is not retroactive), now is the time to review and revise them in order to ensure they comply with ever changing state and federal statutes and court decisions governing trade secrets, employment agreements (and their confidentiality, non-competition, non-solicitation, inventions and intellectual property provisions), and to ensure that they meet the needs of your business.



For more information, please contact Blake Roter at 312/840-7116 or broter@burkelaw.com.

Joan Ahn Recognized for Excellence in Pro Bono Service

Firm associate Joan Ahn recently received an Excellence in Pro Bono Service award from the United States District Court in conjunction with the Chicago Chapter of the Federal Bar Association.



Rebecca R. Pallmeyer, Judge for the U.S. District Court for the Northern District of Illinois, nominated Joan for the award for her exemplary work on behalf of David Daniel Brunner in *Brunner v. U.I.C., et al.*, Case No. 13 C 2820. The selection committee agreed and Joan was presented with the award at the Eighteenth Annual Excellence in Pro Bono and Public Interest Service Award Ceremony earlier this year at the Everett McKinley Dirksen United States Courthouse in Chicago. Congratulations, Joan!

Judge Rebecca R. Pallmeyer and Joan Ahn.

Expanded Scope of Employers' Potential Liability

For Criminal Acts of Supervisors Toward Employees

A recent decision by the United States Court of Appeals for the Seventh Circuit expands the scope of Illinois employers' potential liability for intentional torts (a civil wrong resulting from an intentional act) committed by supervisory employees against other employees outside of work, where the employer has been negligent.

In *Anicich v. Home Depot, U.S.A., Inc., et al.*, the administrator of the estate of a deceased employee and her unborn daughter, who was murdered by a supervisor, filed suit alleging that the supervisor's joint employers' negligence caused the employee's death. Alisha Bromfield was an employee of Home Depot, where she incurred sexual harassment, verbal abuse, and physical intimidation by her supervisor. The supervisor had a history of sexually harassing young female subordinates and Bromfield complained several times to management. The supervisor's joint employers ordered him to take anger management classes, but did not require him to complete them, and never removed him as Bromfield's supervisor. After five years of harassment, the supervisor threatened to fire Bromfield or cut her hours if she refused to accompany him to a family wedding out of state. After agreeing to attend, but rebuffng his advances, she was raped and murdered by the supervisor in a hotel room that he had rented.

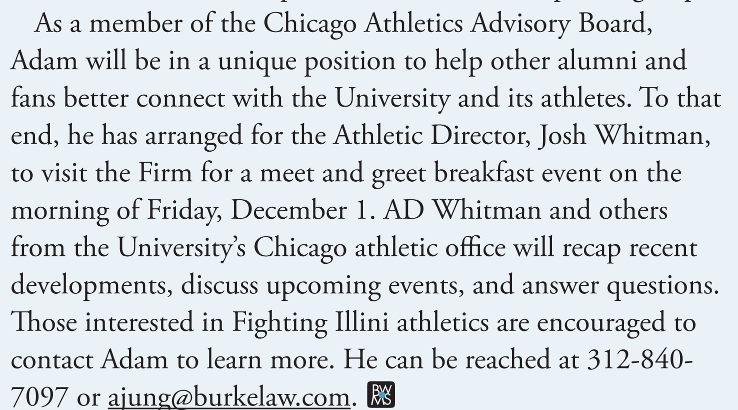
The Court of Appeals, interpreting Illinois law, reversed the district court's dismissal of the lawsuit, which had found that the employers had no duty to control the supervisor's off-work conduct. Instead, the Court of Appeals held that the employers may potentially be liable for the supervisor's intentional tort. The Court first found that while the general rule in Illinois is that no one has a duty to prevent the criminal acts of another, an exception provides that employers have a duty to act reasonably in hiring, supervising, and retaining their employees. In conjunction, the Court noted that under federal anti-discrimination laws, an employer can be held liable for "failing to discipline harassing employees." Mindful of those two principles, the Court found that while employers ordinarily only have a duty to control employees who are acting outside the scope of their employment while on the employers' premises, that duty may be extended if a supervisor uses the "supervisory authority" provided by the employer to effect harassing conduct off-premise, as alleged in this case.

Alex Marks

The Court first found that while the general rule in Illinois is that no one has a duty to prevent the criminal acts of another, an exception provides that employers have a duty to act reasonably in hiring, supervising, and retaining their employees.

Having thus concluded that the employer owed Bromfield a duty, the Court then ruled that whether the supervisor's specific act of violence was foreseeable to the employers based on their knowledge of his particular unfitness — a requirement to proving a negligent hiring/supervision claim — was a question of fact for a jury to decide.

This horrific case illustrates the importance for employers to promptly investigate and address claims of sexual harassment, including implementing appropriate discipline where merited. For more information on this case on employment law, please contact Alex Marks at 312/840-7022 or amarks@burkelaw.com.



ADAM JUNG APPOINTED

Continued from page 1

a strong connection to my alma mater. I am excited for this opportunity to support the Division of Intercollegiate Athletics" said Adam, a partner in the Firm's corporate group.

As a member of the Chicago Athletics Advisory Board, Adam will be in a unique position to help other alumni and fans better connect with the University and its athletes. To that end, he has arranged for the Athletic Director, Josh Whitman, to visit the Firm for a meet and greet breakfast event on the morning of Friday, December 1. AD Whitman and others from the University's Chicago athletic office will recap recent developments, discuss upcoming events, and answer questions. Those interested in Fighting Illini athletics are encouraged to contact Adam to learn more. He can be reached at 312-840-7097 or ajung@burkelaw.com.

What Estate Tax Repeal Means To You

As President Trump's tax reforms take center stage, business owners will surely delight in his call to eliminate the Federal estate tax. If President Trump gets his way, one of the toughest succession issues facing business owners will be wiped away forever from their "to do" lists.

Or will it?

Over its long history, the Federal estate tax has been repealed on a number of occasions (most recently in 2010), only to be reinstated by a new administration seeking additional sources of tax revenues for a whole host of programs, ranging from financing wars to new social programs.

To truly measure the political willpower to make estate tax repeal permanent, you need only look to how the Federal gift tax will be treated.

The Federal Gift Tax

Every taxpayer may utilize his or her currently available $5.49 million "applicable exclusion amount" during lifetime or at death. Generally, if the value of the taxpayer's estate is in excess of his or her applicable exclusion amount at death, a Federal estate tax will be imposed. Currently, the Federal estate tax rate is 40%. (In the case of a married person, a well-structured estate plan will defer the estate tax until the death of the surviving spouse.)

During lifetime, a taxpayer may make "annual exclusion gifts" of up to $14,000 to any family member or friend. Gifts in excess of the $14,000 limitation will be applied against the taxpayer's remaining applicable exclusion amount. To the extent that a taxpayer makes lifetime gifts in excess of her remaining applicable exclusion amount, a Federal gift tax will be imposed. The Federal gift tax rate is identical to the Federal estate tax rate, 40%.

As the Gift Tax Goes, So Goes "Permanent" Estate Tax Repeal

While President Trump's 2017 Tax Reform for Economic Growth and American Jobs proposal clearly outlines his position on estate tax repeal, his plan is eerily silent as to his intentions with respect to the Federal gift tax. As it turns out, he is not alone. Throughout the history of the estate tax repeal debate, legislators have never coupled estate tax repeal with a corresponding gift tax repeal.

Why does it matter?

A repeal of the Federal gift tax will result in the elimination of the current gifting limitations and trigger a massive transfer of wealth within families, most likely to the benefit of the youngest generation who enjoy lower income tax rates. If planned properly, the gifted assets (and all future appreciation on those assets) will be removed from the Federal transfer tax system forever. Thus, Congress will never have the opportunity to impose a transfer tax on these assets again. (If my keyboard had a sad Congressman's face emoji, my kids would instruct me to insert it here!)

Opportunity Cost —The Silent Killer

So called "permanent" estate tax repeal is a trap for the unwary on two levels.

First, keep in mind that estate tax repeal only benefits those taxpayers who die in a year in which the repeal continues to be the law. As has been demonstrated time and again throughout the course of the estate tax debate, repeal has never been permanent.

Second, unfortunately estate tax repeal creates a false sense of security in those taxpayers who should otherwise be in the process of initiating or continuing lifetime planning strategies designed to reduce their overall estate tax liability. The failure to plan leads to missed opportunities and needless estate tax obligations.

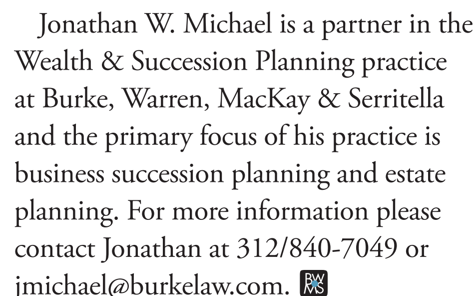
Jonathan Michael

By way of example, a taxpayer with two children and four grandchildren may make annual exclusion gifts in the amount of $84,000 per year (6 x $14,000). Employing this relatively simple gifting strategy over a ten-year period results in $840,000 (along with all appreciation attributable to the underlying gifts) being transferred out of the taxpayer's estate to her family.

Assuming the estate tax was repealed and reinstated after ten years, the reliance upon "permanent" estate tax repeal without a corresponding gift tax repeal will have increased the taxpayer's Federal estate tax bill by $336,000 (i.e., 40% x $840,000).

Talk is Cheap, Planning is Smart

Although we can only advise our clients and friends as to the current tax laws, a deeper understanding of the interplay between the Federal estate and gift tax laws is fundamental to avoiding planning pitfalls and taking optimal advantage of planning opportunities amidst the heated political rhetoric arising out of the tax reform debate. We remind our clients and friends to keep their eye on the ball and refuse to believe everything they read in the headlines.



Jonathan W. Michael is a partner in the Wealth & Succession Planning practice at Burke, Warren, MacKay & Serritella and the primary focus of his practice is business succession planning and estate planning. For more information please contact Jonathan at 312/840-7049 or jmichael@burkelaw.com.

LITIGATION

Please Stop Contacting Me

Dos and Don'ts regarding the Telephone Consumer Protection Act

We all now have a million ways to contact current and potential customers. While this can be incredibly beneficial and help expand our business opportunities, it can also become a nuisance for the recipient inundated by telephone calls, automated recordings, faxes, emails, text messages, social media communications, and of course regular mail. You may find yourself in a situation where someone requests you to "cease and desist" all communications. You may be asking, what does that mean? Do we have to immediately "cease and desist"? What if we still need to contact an existing customer for business purposes? It is important to be mindful of the legal limitations on your ability to contact current and potential customers and your options if someone tells you to stop contacting him or her.

As a starting point, most businesses are familiar with the Telephone Consumer Protection Act (the "TCPA"), the federal statute that regulates telemarketing calls, auto-dialed calls, prerecorded calls, text messages, and unsolicited faxes. *See* 47 U.S.C. § 22 *et seq*. The rules concerning calls can differ depending on whether you are calling a cell phone or a landline and whether the purpose of the call is telemarketing or some other reason. However, in general, someone must provide prior express consent to receive automated calls, pre-recorded messages, text messages, and faxes. Consent can be revoked at any time. Violations of the TCPA start at $500 per violation, and can go up to $1,500 per telephone call or fax for knowing and intentional violations. The law and guidance on this is constantly evolving, and the safest route under the current law is to obtain **prior express written consent** before placing a call where any part of the process is automated or faxing.

Shana Shifrin

Obviously, if someone requests you to "cease and desist" contacting him or her, you should not autodial them or send a fax or you may be in violation of the TCPA. But can you ***manually*** call someone who has requested you to "cease and desist" from contacting him or her? The TCPA is not intended to prohibit or punish businesses from making all telephone calls, only automated ones. However, other statutes and common law torts may apply to calls made after you receive a request to "cease and desist" communications.

Specifically, the Fair Debt Collection Practices Act (the "FDCPA") prohibits "abusive and deceptive" conduct when attempting to collect debts. *See* 15 U.S.C.§ 1692 *et seq*. You could be liable under the FDCPA for communicating with a consumer *in any way* (including in writing) while attempting to collect a debt after receiving written notice the customer wishes no further communication or informs you he or she refuses to pay the alleged debt. The FDCPA also prohibits calls before 8:00 a.m. or after 9:00 p.m. and requires the caller to provide his or her name, the name of the business entity on whose behalf the call is being made, and a telephone number or address at which the person or entity can be reached.

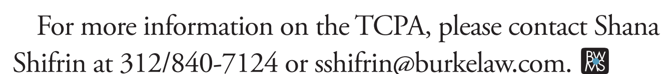
Additionally, the Dodd-Frank Act prohibits unfair, deceptive, or abusive acts or practices (UDAAPs) while collecting consumer debts. (*See* Consumer Financial Protection Bureau's July 10, 2013 Bulletin, available at http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf). The CFPB's UDAAPs include general prohibitions on harassing, deceptive, misleading, and abusive communications with a consumer while attempting to collect a debt. While the FDCPA generally only applies to third-party debt collectors, the CFPB's UDAAPs go further and apply to original creditors and service providers.

Can you call, email, or send a letter to a customer who has requested you to "cease and desist" all communications if the communications do not relate to debt collection? While the TCPA or debt collection laws may not apply, you still need to be mindful of common law liability, *i.e.*, torts such as invasion of privacy, or negligent or intentional infliction of emotional distress. There is no bright line for what would create liability, or what is harassing or unreasonable, and this would vary by the facts of the situation, as well as the relevant state law.

Considering these various rules and their interplay as well as the variances in state law, best practices should include:

- Maintaining appropriate policies and employee education concerning these various laws and their prohibitions;
- Documenting prior written express consent before automated calls, messages, texts, or faxes;
- Stopping all debt collection communications if a customer provides a written "cease and desist";
- Closely monitoring communications with a customer who provides a written "cease and desist" request to ensure they do not violate state law and are not harassing or invasive, and keeping careful records that show the frequency and purpose of each such call; and
- Consulting with counsel if you are unsure of what you can and cannot do.

For more information on the TCPA, please contact Shana Shifrin at 312/840-7124 or sshifrin@burkelaw.com.



SOCIAL MEDIA USAGE
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the NLRA to protect employees if they use social media to engage in activities such as: (1) bringing group complaints to the attention of management; (2) initiating a discussion with a group of employees about a term or condition of employment; (3) discussing shared employee concerns about the terms and conditions of employment; (4) criticizing an employee's job performance and discussing this with other co-workers; (5) criticizing a supervisor's job performance; and (6) generally complaining about a term or condition of his or her employment.

The courts have supported the NLRB's findings when these cases are brought before them. For example, in *NLRB v. Pier Sixty, LLC* (2d Cir. 2017), a New York-based federal appellate court upheld an NLRB ruling that an employer violated the NLRA when it terminated an employee for posting on Facebook a vulgar comment directed at his supervisor. The employee's post was visible to his Facebook "friends," including ten coworkers, as well as to the public. The employer learned of the post and after investigating, terminated the employee. The employee filed an unfair labor practice charge with the NLRB alleging that he had been terminated in retaliation for engaging in "protected concerted activities" under the NLRA. An Administrative Law Judge decided in favor of the employee, and the NLRB affirmed the decision.

The Appellate Court upheld the NLRB's decision on three grounds. ***First***, the Court found that even though the employee's message was dominated by vulgar attacks on his supervisor, the "subject matter" of the message included workplace concerns — management's allegedly disrespectful treatment of employees, and the upcoming union election. Thus, the Court found that the NLRB could reasonably determine that the Facebook post was part of a tense debate over managerial mistreatment prior to the election. ***Second***, the Court found it important that the employer consistently tolerated profanity among its workers and had not previously disciplined employees for it. In the prior six years, the employer had only issued five written warnings to employees and terminated no one for such offenses. Thus, the Court found that the NLRB could reasonably conclude that it was improper for the employer to fire the long-term employee, two days before the union election when no other employees had been previously terminated for use of profanity. ***Third***, the Court found that the comment was made in an online forum that serves as a key platform and tool for employee communication and organization, and not in the presence of customers, nor did it disrupt the work environment. The Court determined that the employee's post was not so damning as to lose protection under the NLRA.

The *Pier Sixty* decision does not stand for the broad proposition that every profanity-laced outburst will be protected, with the Court acknowledging that the employee's conduct was at the outer-bounds of protected activity. Yet, the ruling underscores the need for employers to carefully consider all circumstances relating to employees' social media activities to determine whether a post is related to workplace concerns and even if it is, whether the conduct is so egregious as to lose protection of the NLRA. The *Pier Sixty* case also highlights the need for employers to be consistent when disciplining employees for similar improper conduct.

Determining whether an employee's activity falls under the NLRA may be unclear. Employers confronted by potentially problematic social media postings should focus on the distinction between concerted activity and mere personal griping to ensure that they not discipline an employee for engaging in protected activity.

Employers May Nevertheless Discipline Employees for Their Social Media Posts

All is not lost. Despite NLRA restrictions, employers may discipline employees for their social media activity. Disciplining an employee for violating a social media policy is a delicate process that should only occur after careful investigation and conferring with outside counsel.

Employers must carefully analyze whether the activity could be deemed protected. Determining whether an employee's activity falls under the NLRA may be unclear. Employers confronted by potentially problematic social media postings should focus on the distinction between concerted activity and mere personal griping to ensure that they not discipline an employee for engaging in protected activity. Employers should determine why the employee made the comment, whether the employee's post concerns wages, hours, benefits or other terms and conditions of employment, and whether the employee's comments led to an online discussion with co-employees. Answers to these questions will help determine whether the activity is indeed protected.

If an employee's behavior is not protected by the NLRA, an employer is (generally) free to terminate an at-will employee for problematic social media activity.[2] Therefore, an employee who uses social media to threaten another employee, or to make racist or sexist comments about another employee can (and often should) be terminated. Likewise, an employee who uses social media to merely gripe about his

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personal, malicious views of a fellow co-worker or customer can also be properly disciplined or terminated.

Employers Should Preemptively Craft Appropriate Social Media Policies

As the number of people using social media continues to grow, employers must be prepared to deal with the relocation of "water cooler" talk and workplace gossip to the web. Employers should prepare themselves by drafting appropriate social media policies that address their expectations for employees' social media usage.

Ideally, your employees will be encouraged and inspired to be brand ambassadors and positively promote your business on social media.

Unfortunately, it is impossible to police the internet, and in most cases, against the law to control the online conduct of an employee. You can, however, establish clear and consistent social media policies and educate employees on what to do before they share, post or tweet. Employers, however, must be mindful to not violate NLRB rules by crafting social media policies that are so broad they prevent employees from discussing their wages or other conditions of employment.

Seven key guidelines for crafting a social media policy:

1. Ensure your policy maintains control over the company's official social media accounts. Designate an employee, internal team or third-party vendor to oversee these accounts and make sure that an authorized party can access the accounts at any time. If an employee uses social media on behalf of the company, he or she should have a separate agreement that indicates that the accounts are not for personal use and that all content and contacts are the sole property of the company.

2. Encourage employees to be respectful on social media. They should avoid threatening, discriminating or harassing statements. However, your policy should not include broadly-worded statements that prohibit or discourage any legally protected activity. The policy language should be specific and reference any appropriate company harassment and discrimination policies.

3. Employees must not create the impression that their opinions are those of the company.

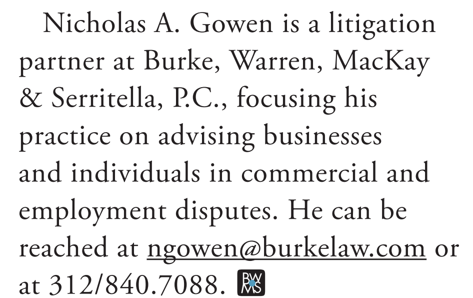
4. Your policy should prohibit employees from disclosing "company confidential financial or sales information," "company marketing or strategic plans," or "internal company proprietary information not available to the general public" such as trade secrets and client lists.

5. Make sure your social media policy does not prohibit employees from discussing their wages or working conditions.

6. Your social media policy should not prohibit the use of the company's logo. Instead, companies should restrict the use of the logo in specific terms to prevent improper use.

7. Overall, it is important that your social media policy be as specific as possible when stating the restrictions placed on employees, and provide examples when possible. A general boilerplate disclaimer stating that the policy is not intended to interfere with the employees' rights under the National Labor Relations Act is insufficient if the policy language is otherwise too broad and vague.

As the use of social media expands, so does the need for employers to have carefully crafted policies that lawfully deal with the many issues that may arise in this area. By crafting a social media policy that is not overly broad or ambiguous and focuses on restricting activity that is not protected under the NLRA, and acting against employees who stray from the NLRA's protections, employers will be able to effectively, and legally, contain their employees' social media activities. Employers who have not recently reviewed their social media policies to ensure legal compliance should consider doing so. While enforcement of facially lawful social media policies can also be a daunting proposition, the starting point for avoiding problems in this area is a carefully worded policy that can survive NLRB review.



Nicholas A. Gowen is a litigation partner at Burke, Warren, MacKay & Serritella, P.C., focusing his practice on advising businesses and individuals in commercial and employment disputes. He can be reached at ngowen@burkelaw.com or at 312/840.7088.

[1] *http://www.pewinternet.org/2016/11/11/social-media-update-2016/*

[2] *Some states, including Illinois, have laws that protect broad categories of off-duty conduct (including social media postings or the information gleaned from them) or require employers to demonstrate a connection between an employee's engagement in an activity and the employer's business. Employers must also take that into consideration when determining whether to take an adverse action against an employee.*

BURKE, WARREN,
MACKAY & SERRITELLA, P.C.

330 N. Wabash Avenue
Suite 2100
Chicago IL 60611-3607

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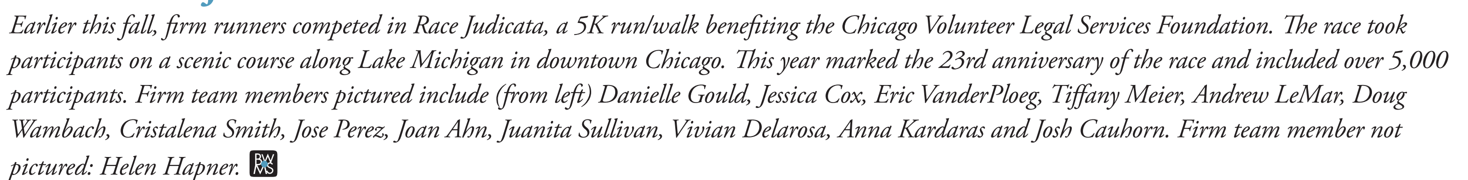
Firm's Race Judicata Team



Earlier this fall, firm runners competed in Race Judicata, a 5K run/walk benefiting the Chicago Volunteer Legal Services Foundation. The race took participants on a scenic course along Lake Michigan in downtown Chicago. This year marked the 23rd anniversary of the race and included over 5,000 participants. Firm team members pictured include (from left) Danielle Gould, Jessica Cox, Eric VanderPloeg, Tiffany Meier, Andrew LeMar, Doug Wambach, Cristalena Smith, Jose Perez, Joan Ahn, Juanita Sullivan, Vivian Delarosa, Anna Kardaras and Josh Cauhorn. Firm team member not pictured: Helen Hapner.